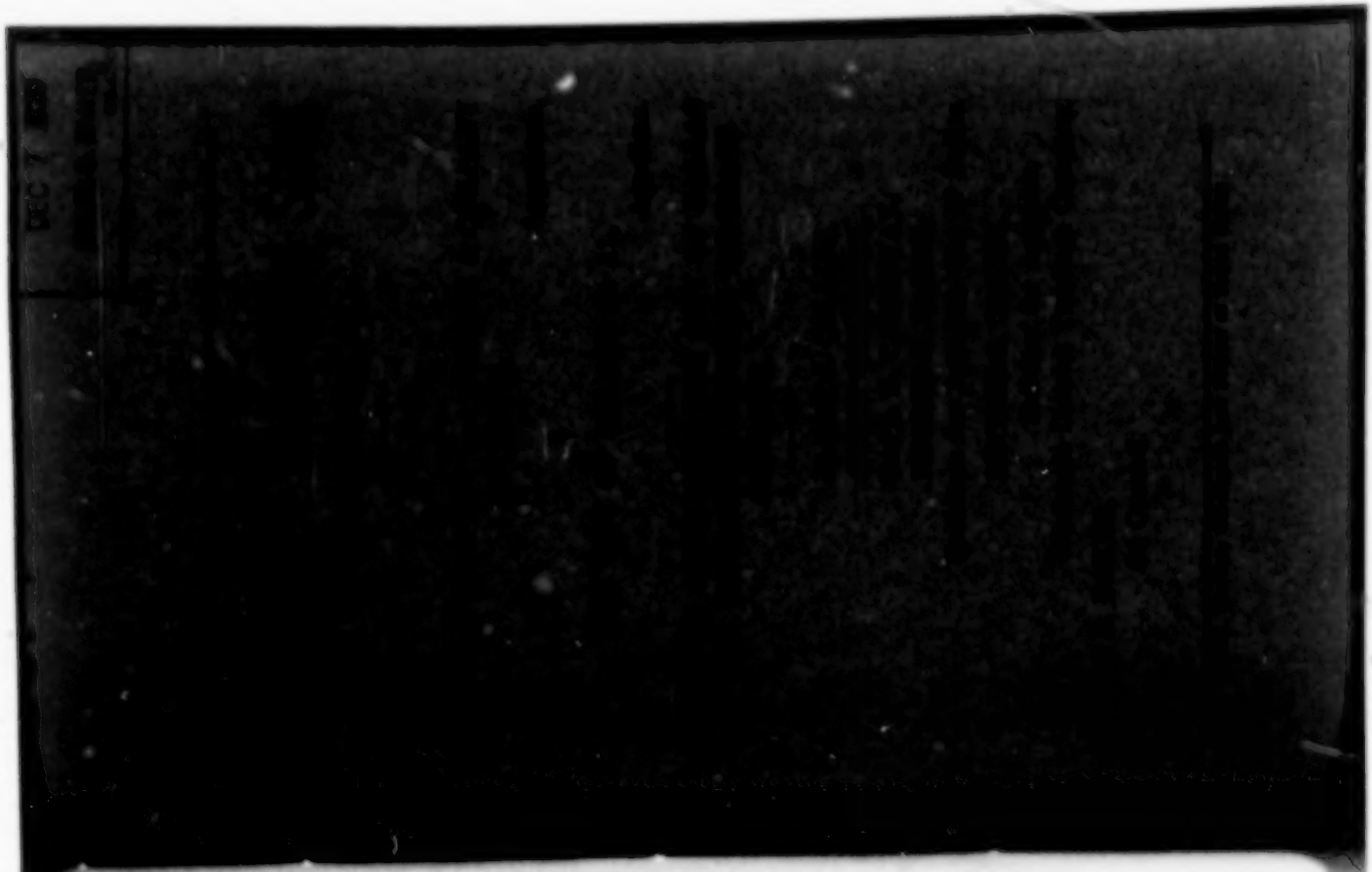

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The parties having stipulation herein that "**Appellants' prayer for injunctive relief is hereby limited to the removal of said switch track and so much of the main track East of Appellant's plant as may be essential to the maintenance and operation of said switch track,**" this Honorable Court will not consider any question other than the right of Appellants to enjoin the removal of the switch track serving their plant. That question was determined adversely to Appellants' contention in the case of Armour & Company v. Texas & Pacific Railway Company, 258 Fed. 185..... 17

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AUTHORITIES.

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 149.

ARMOUR & COMPANY and ARMOUR & COMPANY OF TEXAS,

Appellants,

v.

THE CITY OF DALLAS, Et Al.,

Appellees.

BRIEF FOR APPELLEES, THE CITY OF DALLAS and THE WHOLESALE DISTRICT TRACKAGE COMPANY.

STATEMENT.

In connection with the statements made by Appellants and Appellee, the Texas & Pacific Railway Company, we beg leave to submit to the Court the following additional statement:

Requisite diversity of citizenship among the parties to the suit sufficient to support jurisdiction of the Federal Courts not appearing, jurisdiction in the Federal Courts is claimed upon the theory that certain of appellants' alleged rights, which were said to be protected by the fifth amendment, the fourteenth amendment, and a portion of Section X of Article 1, of the Constitution of the United States, were about to be infringed by appellees (R. pp. 8-24-29).

Pacific avenue is a thoroughfare of the City of Dal-

las, located adjacent to and parallel with Commerce, Main and Elm streets of the city, they being the three principal business streets of said city. Pacific avenue is crossed by Lamar, Griffin, Akard, Ervay, Harwood and Preston streets, all important and much traveled thoroughfares of the City of Dallas. Appellee, The Texas & Pacific Railway Company, has two main tracks and numerous switch tracks on said Pacific avenue. The tracks and switches on said avenue are so extensive and numerous and the operation of the Railway Company's trains, engines and cars over said street so numerous as to practically destroy said avenue as a public thoroughfare and to endanger the life, limb, comfort and health of the citizenship of the City of Dallas who are compelled to cross said avenue in the conduct of their personal affairs and business. There are over one hundred trains operated daily on said avenue by the Railway Company. Pacific avenue is the dividing line between North and South Dallas and possibly seventy per cent of the population of Dallas lives north of said avenue and are consequently compelled to cross said avenue in coming to and going from business section of the city. The use of the said avenue by the appellee Railway Company became so burdensome and oppressive as to imperatively demand that the City of Dallas take some action, prompt and efficient, to relieve the situation and to protect the life, limb, comfort, safety and welfare of the citizenship of the City of Dallas. In obedience to such demand, the City of Dallas heretofore passed certain valid police regulations with reference to the use of the public highways, streets and ways of the said city by railway companies which were not being observed by defendant railway com-

pany. The City of Dallas further threatened, intended and would, but for the action of defendant Railway Company in signing the contract set forth in plaintiff's said petition, have passed other ordinances regulating and controlling the use of said avenue by defendant Railway Company, and denying the use of said avenue by defendant Railway Company between Lamar street and Central avenue in the City of Dallas. The Texas & Pacific Railway Company could not have operated its trains over said avenue and complied with the reasonable police regulations, ordinances and demands which the City of Dallas heretofore made, and which they would have made except for the agreement with the said Railway Company, as aforesaid, and said Railway Company, realizing and acknowledging such to be a fact, agreed with the City of Dallas upon a relocation of a small segment of its tracks upon said Pacific avenue.

It is not contemplated that the Texas & Pacific Railway Company shall abandon its right to operate its trains into and through the City of Dallas or to abandon the use of Pacific avenue except upon the small segment between Lamar street and Central avenue in said City. But it is contemplated that the tracks of defendant Railway Company shall be removed from the small segment on Pacific avenue and shall be located at some other point in the City of Dallas, and such removal is made in obedience to the imperative demands of the public welfare. It is contemplated by the contract that the defendant Railway Company and its Receivers shall be given easements and franchises on, over and along other portions of the said City; the public interest demands that the removal of the tracks as con-

templated in the said contract (R. 68 and 69, 104-105).

By its supplemental answer, appellee declares that the provisions of the City Charter relating to contracts do not contemplate a contract of the character entered into and complained of by the said appellant, and therefore the Auditor's signature was not necessary. That if the contract complained of by appellants falls within the class of contracts referred to by the Charter, then the Auditor did not sign the same for the reason that the said appellants had filed their bill for an injunction in the United States District Court for the Northern District of Texas on the 21st day of December, A. D. 1918, and during the pendency of the said suit filed another bill for an injunction against the defendant and its co-defendants in the 66th District Court of Texas and obtained a temporary restraining order against appellees and the co-defendants from carrying out the terms of the contract. That in said bill in the State Courts the appellants urged that the contract was void, for, among other reasons, that the same violated Section 42 of Article XIV of the Charter (R. 71, 72 and 73; also R. 129, Stipulations of Fact and also Decree of Court, R. 74).

APPELLEES' COUNTER PROPOSITIONS.

I

THE JURISDICTION OF THIS COURT.

1. When the jurisdiction of this Court is invoked upon the alleged ground that the litigant is enjoying a valid contract, the obligation of which is about to be impaired, through unconstitutional State or Municipal

action, the facts must substantially show the **existence** of a contract and its **unjustifiable** impairment, or jurisdiction fails.

2. Where jurisdiction of this Court is invoked on the ground that through State or Municipal action a person is about to be deprived of property without due process of law, the **existence of the property** and the **unconstitutional** appropriation of same must appear, or jurisdiction fails.

3. Where jurisdiction of this Court is invoked on the ground that private property is about to be taken for public use without just compensation, the **existence** of the property and the **unconstitutional** taking of same must appear, or jurisdiction fails.

REMARKS.

The transactions narrated in the Bill of Appellants as the basis of their claim, were transactions originally had by Armour of New Jersey with appellees, the interests of Armour of Texas being derivative. It is by virtue of transactions between appellants that Armour of Texas claims only to have succeeded to the alleged rights which are claimed to be protected by the Federal Constitution. Accordingly, Armour of New Jersey figures most prominently in the story.

Neither of the Armour Companies ever made any contract with the Railway Company or the City of Dallas, or ever acquired any vested property interests in the switch track constructed by the Railway Company through any arrangement with or purchase from or estoppel against the Railway Company or the City of Dallas.

Armour of New Jersey, in its purchase of the Dallas

property from the original owners of same, was represented by its attorney, W. M. Short, and its land man, S. S. Jerome.

Mr. Short's testimony appears in the record at pages 125-131. His testimony affirmatively shows that no contract respecting the construction or maintenance of the switch was ever made by Armour of New Jersey with any of the appellees, and that no vested right to keep the switch in place and in operation was ever obtained by Armour of New Jersey.

Mr. Short testified:

> "As representing Armour & Company, I had oral negotiations with both Everman and Hall about the purchase of said lot and the construction of a switch, and both of them were advised that the purchase of the lot was upon the conditions stated" (R. p. 126).
>
> Everman "was connected with the Texas & Pacific Railway Company as General Manager, with headquarters at Dallas" (R. p. 125).
>
> Hall "was General Attorney of the Texas & Pacific Railway Company, with his headquarters at Dallas" (R. p. 125).

To Mr. Short, Everman and Hall expressed their opinion that the City could not require the Railway Company to remove its tracks from Pacific avenue (R. p. 126).

The stated negotiations and conversations of Mr. Short with Messrs. Everman and Hall is as near as Mr. Short ever approached the making of a contract. Indeed, Mr. Short seems not to have attempted to secure a contract with any of the appellees respecting the switch track in question.

Mr. Jerome's testimony appears at page 135 of the Record, and his nearest approach to the contract matter is his statement that Mr. Everman knew of the condition in the contract to purchase the lot, and assured him that if the City granted the franchise, the Texas & Pacific Railway Company would put in a switch and maintain and operate it, and that acting upon these assurances, he, on behalf of Armour & Company consummated the contract for the purchase of said lot which he otherwise would not have done (Record, p. 135).

The authority of Everman and Hall even to make contract of the character in question on behalf of the Railway Company does not appear and obviously a promise by Everman that the Railway Company would put in a switch and operate it falls short of being an enforcible contract.

As to the necessity of proof of authority in Everman, see:

K. C. M. & O. Ry. Co. v. Sweetwater, 104 Tex. 329.
Logue v. Southern Ry. Co., 106 Tex. 445.
Mo. Ry. Co. v. Hood, 172 S. W. 1120.

Everman testified that there was no written contract or agreement made with Mr. Jerome.

> "We expected to submit our proposed form of contract for consideration and induce the beneficiary of the contract to sign it if it was possible to do it. We had a standard form of contract for industry tracks, and with strict instructions to be governed by the conditions of it. Armour & Company were requested to sign the industry contract. Mr. Jerome would not sign it. He took exception to certain of the conditions and I told him we couldn't change the conditions at all and finally it was put in without his signature. I consider it

> our industry track. I consider that we had much better right to use it and greater privilege of using it for other business if no contract was signed covering it. When Armour & Company signed no contract for it, I consider this track ours" (R. p. 181).
>
> "That standard form was adopted, and parties who want industry tracks were required to execute the standard form. It has a contract for the management of the property and that standard form was presented to Armour & Company in this instance and they refused to execute it. The Texas & Pacific Railroad paid for the construction of this track, for the ties, grading, fastenings and labor. Armour & Company paid nothing" (R. p. 181).

The switch track is entirely in Pacific avenue, and does not rest upon or physically touch appellants' property.

The permit granted by the City of Dallas to the Railway Company for the construction of the switch track ran only to the Railway Company and was not assignable. It was made subject to the City Charter and ordinances of the City of Dallas and therein the City expressly reserved the right to amend or alter the same, and it became automatically subject of course to the State Constitution (R. pp. 37-40).

It cannot fairly be claimed that appellants ever made any contract with appellees or acquired from appellees any rights under the franchise in question.

AUTHORITIES.

Mayor of Houston v. Houston City Railway, 83 Texas 548.

Storrie v. Houston City Railway Company, 92 Texas 129.

San Antonio Traction Company v. Altgelt (Texas), 81 S. W. 106.

San Antonio Traction Co. v. Altgelt, 200 U. S. Reports 304.

D. & R. G. Ry. Co. v. Denver, 250 U. S. 241.

Western Union Telegraph Co. v. Richmond, 224 U. S. 160.

City of St. Louis v. United Ry. Companies, 210 U. S. 264.

S. W. Telegraph & Telephone Co. v. City of Dallas, 174 S. W. 636.

(Writ of Error refused by Supreme Court of Texas).

Ennis Water Works v. City of Ennis, 233 U. S. 652.

Seaboard A. L. Ry. Co. v. Raleigh, 242 U. S. 15.

II

Appellants' legal remedy is adequate and complete and no allegation or facts appear disclosing financial irresponsibility of the Railway Company or the City. Accordingly the bill is not maintainable in equity.

REMARKS.

Substantially the same state of facts which is presented in this record was presented in another suit between appellants and the Railway Company respecting this same matter and therein it was decided by the Circuit Court of Appeals for the Fifth Circuit that appellants' remedy, if any, was at law. Armour & Company v. Texas & Pacific Railway Company, 258 Federal, p. 185.

III

Because the jurisdiction of the Federal Court in this

case is made to rest upon the threatened invasion of constitutionally protected rights, appellants must first show the existence of rights so protected and threatened invasion of same, and, failing on these issues, cannot aid their bill by urging other questions not involving Federal issues.

REMARKS.

The points made by appellants in and under their assignments of error, 4th to 9th, inclusive, are in the category referred to in the foregoing counter proposition. These points all relate to alleged irregularities in the contract between the City of Dallas and its co-appellees (to which contract appellants were in nowise parties). They throw no light upon the constitutional issues urged by appellants.

AUTHORITIES.

Dallas Electric Company v. City of Dallas (Tex.), 58 S. W. 153.

Martin v. Lankford, 245 U. S. 547.

IV

The exercise by a Federal Court of its discretionary right to refuse an injunction will not be revived on appeal where the complaining party has elected concurrently to pursue another application for injunction respecting the same matter in state courts of co-ordinate jurisdiction.

REMARKS.

While the instant suit was pending, untried, in the Federal Court, complainants, joined by their counsel

as co-complainants, filed another bill against appellees herein respecting this same controversy in the state courts of Texas, and obtained temporary injunction (R. p. 204). Defendants in that bill perfected an appeal which was stipulated to be still pending at the time the Federal District Court heard and decided the application for injunction contained in the bill in this cause (Record, p. 204).

V

It affirmatively appears from the Charter of the City of Dallas offered in evidence by appellants, that the Board of Commissioners possessed the express power to authorize steam railroads operating their lines from the City of Dallas to other cities beyond its limits, to lay their tracks and establish their switches on the streets or other property of the City, but subject only to the terms of the Charter and under such conditions as may be imposed by the Board of Commissioners. It does not appear from the appellants' petition or evidence adduced upon the trial that any authority existed in the City of Dallas under its charter or otherwise, to confer upon the appellants the right or exclusive use of said switch tracks nor does it appear that the authority existed in the said appellants to accept such a right and lawfully exercise the same.

AUTHORITIES.

Article II, Sub-division 18 of Section 8 of the Charter of the City of Dallas (R. 78).

(See petition of Appellants, R. pp. 1, 5, 10 and 13).

VI

The granting of the switch track ordinance to the

Texas & Pacific Railway Company in this case was the exercise of a legislative power conferred upon the City of Dallas by the State over its public streets which can only be exercised in behalf of the general public, and it would be incompetent for the City to grant a franchise for the use of its streets for the private uses of any citizen.

AUTHORITIES.

McQuillan on Municipal Corporations, Sec. 1363, Vol. III, page 2923.

McQuillan on Municipal Corporations, Sec. 1627, Vol. IV, p. 3403.

Glaessner v. Anheuser Busch Brewing Assn., 13 S. W. 707.

Charles Fustafson v. Theodore Ham, L. R. A., Vol. 22, p. 565.

State Ex Rel. St. Louis Underground Service Company v. Murphy, 31 S. W. 784 and 34 S. W. 51.

Elliott on Roads and Streets, Sec. 1048, Vol. II, p. 571.

VII

It is incompetent for the Legislature of Texas or a municipality to grant the exclusive use of its streets to any person or corporation.

AUTHORITIES.

City of Brenham v. Waterworks Co., 67 Texas 543; 45 S. W. 143.

Ennis Waterworks Co. v. Ennis, 136 S. W. 513; Affd. 144 S. W. 930.

VIII

A citizen has no vested right in a contract made between a municipality and a public utility, though made for his benefit, and he cannot prevent the municipality from modifying or abrogating the contract so that he will be deprived of the benefits thereof.

AUTHORITIES.

Asher v. Hutchinson Waterworks Co., 66 Kansas 496; 71 Pac. 813; 61 L. R. A. 52.

Little Rock Ry. & Elec. Co. v. Dowell, et al., 101 Ark. 223; 142 S. W. 165; Ann. Cases 1913-D 1086.

Mangan v. Texas Transportation Co., 44 S. W. 998.

IX

It affirmatively appears that the contract rights alleged to exist by the appellants grow out of the relationship established by the ordinance granting the right to construct and maintain the switch tracks, therefore, appellants took their rights subject to the laws of the State of Texas, the terms of the said ordinance and the inalienable police powers of the City of Dallas.

AUTHORITIES.

D. & R. G. Ry. Co. v. Denver, 250 U. S. 241.

Elliott on Roads and Streets, Vol I, Sec. 85, p. 105.

Morel v. S. A. & A. P. Ry. Co., 177 S. W. 1049.

Elliott on Railroads, Sec. 1082, Vol. III, page 12.

X

The fact that the City Auditor did not sign the agreement between the City, The Wholesale District

Trackage Company and the Texas & Pacific Railway Company is not a defect in the contract which the appellants would in law be allowed to take advantage of.

AUTHORITIES.

Dallas Electric Co. v. City of Dallas, 23 Texas Civ. 323-327; 58 S. W. 153.

XI

If the completion of the agreement between the City, The Wholesale District Trackage Company and the Texas & Pacific Railway Company for the removal of said tracks from Pacific avenue, was interrupted by the conduct of appellants in instituting legal proceedings in the courts and obtaining temporary injunction against the City on such grounds, the appellants cannot be heard in a Court of Equity to complain of the same.

AUTHORITIES.

10 R. C. L., Sec. 141, page 392.

See Stipulations of Facts, R. 129.

XII

Where a contract is affected by a public interest, a Court of Equity will not interfere with such public interest or ignore the same in order to grant relief to a complainant under said contract.

D. & R. G. Ry. Co. v. Denver, 250 U. S. 241.

AUTHORITIES.

Armour & Company, et al., v. Texas & Pacific Ry. Co. and Pearl Wight, in the Circuit Court of Appeals, 5th Circuit, 258 Fed. Rep., p. 185.

Beasley v. Texas & Pacific Ry. Co., 191 U. S. 492.

Texas & Pacific Ry. Co. v. City of Marshall, 136 U. S. 104.

Northern Pacific Ry. Co. v. Territory of Washington, 142 U. S. 492.

XIII

The switch track ordinance granted by the City to the Railway Company was granted and could be granted only for the use of the general public and not for the private use of appellants, although appellants may receive private benefits and advantages under the same, therefore, appellants took no higher right into the switch tracks than may be enjoyed by the general public.

AUTHORITIES.

Mangan v. Texas Transportation Co., 44 S. W. 999 and particularly page 1001.

Rhinehart v. Redfield, 87 N. Y. State 789; 93 Appeal Division 410; Affd. 179 N. Y. 569; 72 N. E. 1150.

XIV

An individual can acquire no vested right as against the public in the continued service of a public utility and such rectification of a railway line as the public interest might dictate can be made, notwithstanding disadvantage to private business or injury to private contracts.

AUTHORITIES.

Wyman Public Service Corporations, paragraphs 307 and 318.

Elliott on Railroads, Vol. I, paragraphs 363, 364, 386, 387 and 388.

Hoard vs. Railway Company, 123 U. S. 222 and 227, 31 L. Ed. 130.

Ford v. Railway Company, 117 Pac. 809.

Scholten v. Railway Company, 73 S. W. 915.

Whalen v. Railway Company, 17 L. R. A. (N.S.) 130.

XV

The Franchise Ordinance which forms the basis of appellants' action contains the following provision:

> "In the event the Railway Company shall be **required to abandon**, to elevate or to place in subways **said main tracks on Pacific avenue**, then in that event, **this franchise shall be subject thereto.**"

The facts in evidence show that the Railway Company could not successfully operate its trains upon Pacific Avenue and comply with the reasonable police regulations then in effect and those which the City was threatening to pass and enforce, and further, that the City had the Charter power to compel the Railway Company either to place its tracks underground or to elevate same above the surface of the street, and that the Railway Company was financially unable to comply with either requirement. Confronted by such a situation, the Railway Company was not compelled to await the outcome of an unsuccessful conflict with the City, but could admit and acknowledge the rights and power of the City in the matter and contract to remedy the situation, and acting under such compulsion, the Railway Company was "required to abandon its main line tracks" under the terms of the Franchise grant.

REMARKS.

The provision of the Franchise grant is correctly quoted in the foregoing proposition (R. 25).

The City had the Charter power to compel the Railway Company either to place its tracks underground or to elevate them above the surface of the ground (R. 91).

The Railway Company could not successfully operate its trains upon Pacific Avenue and comply with the reasonable police regulations then in force and those which the City was threatening to pass and enforce (See testimony of Mr. Lancaster, R. 102-114).

The Railway Company was not in a position to finance placing its track underground or overhead (R. 103); D. & R. G. Ry. Co. v. Denver, 250 U. S. 241.

XVI

Where the evidence, as in the instant case, shows that the City Charter provided for a continuing tax levy of 25 cents upon the $100.00 valuation, thereby creating a special fund for street improvement work, and that such tax produces annually $360,000.00, such levy is the equivalent of an appropriation required by the Charter of the City of Dallas and the Constitution of the State (R. 128-9 and 131).

XVII

The parties having stipulated herein that "**Appellants' prayer for injunctive relief is hereby limited to the removal of said switch track and so much of the main track East of Appellant's plant as may be essential to the maintenance and operation of said switch track,**" this Honorable Court will not consider any

question other than the right of appellants to enjoin the removal of the switch track serving their plant. That question was determined adversely to appellants' contention in the case of Armour & Company vs. Texas & Pacific Railway Company, 258 Fed. 185.

XVIII

It affirmatively appearing that if appellants are granted an injunction to prevent the removal of the switch track serving their plant, such injunction will inevitably and necessarily require the Texas & Pacific Railway Company to maintain its main line track across four important streets of the City of Dallas, to-wit: Swiss avenue, Olive street, Pearl street and Harwood street, and it affirmatively appearing from the Record that such streets are principal thoroughfares of the City of Dallas, and the public interest imperatively requires and demands the removal of all railway tracks thereon, the Court should deny equitable relief and remit the parties to their action at law.

REMARKS.

See Stipulation of parties hereto (R. 129).

Preston, Olive, Pearl and Harwood Streets (particularly Harwood Street) are principal thoroughfares of Dallas over which the traffic is heavy (R. 106, 120 and 124).

SUMMARY.

We respectfully submit to the Court that this case is ruled by Armour & Company, et al., v. Texas & Pacific Railway Company and Pearl Wight, supra, and the appellants are without equitable relief. An analysis

of the appellants' case will show clearly that at the time the Ordinance was passed granting the switch track right to the Texas & Pacific Railway Company as well as prior thereto, an anxious concern was exhibited by the City in reserving in express language the power to act in the event the said Railway Company should be required to abandon, elevate or place in subways, said main tracks on Pacific Avenue; that in such event the switch track franchise should be subject thereto (R. 25, Sec. 3 of Ordinance; also testimony of J. E. Lee, R. 124).

The Ordinance also reserved the right to amend or alter the Ordinance and made it subject to the Charter and Ordinances then existing, and such future Charter and Ordinances as may be thereafter passed (R. 25; Sec. 2 of Ordinance).

It is further provided by Section One of said Ordinance that the right, privilege and franchise granted to the Texas & Pacific Railway Company was subject to the following conditions, **a violation of any one of which or a misuse or abuse of same would constitute a sufficient ground for the forfeiture of the entire right, privilege and franchise** (R. 24).

It will be observed that the only legal conclusion that can be drawn from the instrument is that it does not intend to confer an irrepealable or uncontrollable or indefeasible vested right in either the Railway Company or Armour & Company to use the said tracks for the entire period of twenty years. The Armour & Company made its dedication subject to the terms of this ordinance. It well knew that public demand may create the necessity whereby the said Ordinance may be changed or modified or that the same may be entirely

abandoned. It could understand nothing else from the plain language used or the circumstances existing at the time.

The evidence in the record is overwhelming in its conclusive nature to the effect that both the City and the Railway Company understood the public necessity for the removal of the tracks. (See recommendation of W. M. Holland, Mayor of the City of Dallas, R. 91. Also action of the City against Railway Company, R. 93; also Report of City Engineer as appears at bottom of page 94 to page 98 relating to abolishing of grade crossings. Also Section 105, on page 98 of Record, action of the City requiring gates, etc., also as shown on page 99, petition of Railway Company to Railroad Commission of Texas for permission to remove tracks from Pacific Avenue between Griffin and Preston Streets; also as shown on page 101, Judgment or Order of Railroad Commission upon said application, which judgment in part says:

> "That the removal of the tracks of the petitioners now located upon Pacific Avenue between Preston Street and Griffin Street in the City of Dallas, and the relocation of the same and the roadbed of their line in the vicinity of said locality, and the re-arrangement of their tracks on said Avenue, between Lamar Street and the West line of Griffin Street, will have the effect of reducing the grades of their lines within said City, and will **serve the public interests by promoting the public safety and convenience.**"

These are the facts found by the Railroad Commission of Texas (R. 191). Also see testimony of J. L. Lancaster, Vice-President of the Texas & Pacific Railway Company, page 105 to 107 of Record. Also testi-

mony of Fletcher F. McNeny, on page 129 of the Record. Also consent of Wm. G. McAdoo, Director General of Railroads, page 169 of the Record.

The Appellants do not combat the proof that an overwhelming public demand existed and was recognized by both the City and the Railway Company as well as the citizens in general, that the existence of the said tracks on Pacific Avenue made a dangerous menace to the life, limb and convenience of the general public as well as a detriment to their property rights.

We believe that no other conclusion can be reached than that the necessity existed for action. The fact that the City chose to act by way of an agreement rather than by an Ordinance does not change the necessity for action. The City had the legal right and discretion to adopt any mode it chose to accomplish the result.

With reference to the contract agreement between the City, The Wholesale District Trackage Company and the Texas & Pacific Railway Company complained of as being invalid for want of the signature of the City Auditor and for failure to provide a fund to pay the One Hundred Thousand Dollars complained of by Appellants, we respectfully submit that it affirmatively appears by the Record on page 127, from the testimony of W. W. Peevey, who was then City Secretary of the City, that the said Peevey failed to present the same for signature to the said Auditor (R. 127).

It also affirmatively appears from the testimony of R. V. Tompkins, the City Auditor at that time, and the present time, that he did not sign the same (1) because it was not called to his attention, and (2) because the City was under an injunction brought in the State Courts by the Appellants, from carrying out the said

contract, and that one of the grounds urged in the said suit was the fact that it was not countersigned by the Auditor (R. 128).

It further appears from the testimony of the Auditor that an annual twenty-five cent levy is made by the City Charter to take care of Street improvements and that the One Hundred Thousand Dollars complained of by Appellants was chargeable to this fund (R. 129). Also on page 131 of the Record the Auditor testifies as follows:

> "Q. In view of your statement of the accounts of the City, are you ready, if the injunction is removed to countersign the contract as Auditor?"

To which question the Auditor answered, over the objection of appellants:

> "A. Yes" (R. 131).

We submit that in view of the special tax levied for street improvements, the Constitution of the State was literally complied with in creating the obligation.

We beg to further state that in view of the Record and particularly by the stipulations entered into by the appellants as appears on page 11 of appellants' brief, the appellants cannot be said to be seriously objecting to the One Hundred Thousand Dollars payment by the City for the real estate desired to be acquired under its agreement with the Trackage Company and the Railway Company. It will be observed that the obligation in the agreement insofar as it relates to the City, may be stated succinctly as follows:

The City obligates itself:

(1) To grant certain franchise rights to occupy streets in a proposed industrial district to be created.

(2) To abandon a certain portion of Pacific Avenue "lying west of the switch track in controversy" and permit the same to be used by the Railway Company.

(3) That it will pay the Trackage Company One Hundred Thousand Dollars in consideration for the real estate to be conveyed to it by the Trackage Company, and shall use all of the real estate in opening and extending Pacific Avenue between Griffin and Lamar Streets (R. 26).

We beg to state that the real estate proposed to be purchased lies West of the Appellants' property at the extreme end of the proposed track removal. The stipulation, as appears on page 11 of appellants' brief, in substance says:

> "That during the pendency of the appeal herein, the switch track serving the Appellants' property shall be maintained and operated, and **that all other tracks on Pacific Avenue West of Appellants' plant may be removed,** and that all other tracks on Pacific Avenue East of Appellants' plant not necessary for the maintenance and operation of said switch track may be removed and such removal shall not be held to constitute a contempt of this Court, and **Appellants' prayer for injunctive relief is hereby limited to the removal of the said switch track and so much of the main track East of Appellants' plant as may be essential to the maintenance and operation of the said switch track, etc.** * * *" (R. 19).

Thus, it affirmatively appears that appellants are not interested in the expenditure of the money for the removal of the tracks West of their plant. The agreement setting out the City's obligation appears on page 26 of the Record.

We respectfully submit that under no consideration can the attack made by appellants against the contract be sustained either in view of the law or the facts in the case. We further beg to assert that The Wholesale District Trackage Company, as shown by the testimony, is merely an agency created by the interested property owners for the purpose of aiding and assisting in carrying out this improvement. Its purpose, as shown by the agreement as well as the testimony, is to acquire certain rights in behalf of the Railway Company in the new Industrial District, as well as to aid in the collection of voluntary assessments made upon the citizens (R. 117, testimony Fletcher F. McNeny).

We respectfully submit the foregoing authorities and request that the propositions of law and argument be considered not only in behalf of the appellee, City of Dallas, but also in behalf of the appellee, The Wholesale District Trackage Company.

It is therefore respectfully submitted that the decree of the Court below be sustained.

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